IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CONSOLIDATED RAIL CORP.	:	CIVIL ACTION
v.	:	
AIR LIQUIDE CORP.	:	
v.	:	
C.H. ROBINSON CO.	:	No. 99-247

ORDER-MEMORANDUM

AND NOW, this ___ day of July, 1999, the motion for summary judgment of third-party defendant C.H. Robinson Company, in which defendant Air Liquide Corporation joins, is granted. Fed. R. Civ. P. 56.

Plaintiff Consolidated Rail Corporation (Conrail) brings this case for demurrage[1] in the amount of $42,275 pursuant to 49 U.S.C. § 10746.[2] Jurisdiction is the Interstate Commerce Act. 28 U.S.C. § 1337.

In December, 1997, Air Liquide contracted with Robinson to ship a pressured vessel from Plaistow, New Hampshire to Pittsboro, Indiana. The shipment required the use of three rail

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[1]Demurrage is "a charge exacted by a carrier from a shipper or consignee on account of a failure to load or unload cars within the specified time prescribed by the applicable tariffs . . .." Union Pacific R.R. Co. v. Ametek, Inc., 104 F.3d 558 (3d Cir. 1997) (quoting Black's Law Dictionary 432 (6th ed. 1990)).

[2]49 U.S.C. § 10746 reads, in relevant part:

> A rail carrier . . . under this part shall compute demurrage charges . . . in a way that fulfills the national needs related to-
>
> (1) freight car use and distribution; and
>
> (2) maintenance of an adequate supply of freight cars to be available for transportation of property.

cars - a load car, which carried the vessel, and two idler cars, which separated the load cars from the cars immediately preceding and following. Robinson mot., ex. C; Strever Aff., ¶ 9. Robinson arranged for transportation of the vessel with Conrail, which served the destination of Pittsboro.

The parties agree that the shipment arrived in early January, 1998, and that the two idler cars were released to Conrail on January 6, 1998. No demurrage accrued as to the idler cars. DiGiovanni Aff., ¶ 5. The dispute centers around when the load car was released to Conrail.

Robinson and Air Liquide claim that the equipment was unloaded on January 5, 1998 and that all three cars were released on January 6, 1998, when a Robinson representative placed a call to a Conrail representative and orally released the cars. Allison Aff., ¶ 5; Strever Aff., ¶ 10. Robinson asserts that this method of communicating release was consistent with its prior dealings with Conrail. Strever Aff., ¶ 14.

Robinson and Air Liquide became aware several weeks later that the load car had not been removed from its destination. Robinson called Conrail during the first week of February, 1998 to release the car a second time. Allison Aff., ¶ 5; Strever Aff., ¶ 12. Conrail later issued an invoice for the demurrage charges accrued through February 7, 1998. Robinson mem., ex. D. After Air Liquide and Robinson disputed the demurrage, Conrail filed suit against Air Liquide as the consignee of the shipment. Air Liquide in turn filed a third-party action against Robinson.

"Summary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the nonmoving party, the court concludes that there is no genuine issue of material fact to be resolved at trial and the moving party is entitled to judgment as a matter of law." In re Baby Food Antitrust Litig., 166 F.3d 112, 124 (3d Cir. 1999) (quoting Petruzzi's IGA v. Darling-Delaware, 998 F.2d 1224, 1230 (3d Cir. 1993)). To survive a motion for summary judgment, the nonmovant may not rest on allegations in the pleadings, but must present sufficient evidence to support its position for a reasonable jury to find for the nonmovant. See Glaziers and Glassworkers Union v. Newbridge Sec., Inc., 93 F.3d 1171, 1178 (3d Cir. 1996).

Here, Conrail does not present sufficient evidence to survive summary judgment. Conrail's sole proffer in support is a computer-generated business document that shows the load car was not recorded as "released" until February 7, 1998. Pl. mot., ex. B.[3] This is not the material fact at issue, however. It is undisputed that Conrail did not realize that the load car was to be released until that date. The issue is whether that belief was reasonable and proper under the circumstances. Conrail does not refute Air Liquide's evidence that the vessel was unloaded on January 5, 1998 or Robinson's evidence that the cars were

[3]Robinson's motion to strike the affidavit of John DiGiovanni is denied. The affidavit certifies the authenticity of the business record at issue. Though it does not create a genuine issue of material fact, such evidence is competent and admissible as a business record. Fed. R. Evid. 803(6).

telephonically released on January 6, 1998 in accordance with the parties' prior practice.

Accordingly, Air Liquide and C.H. Robinson are entitled to judgment as a matter of law.

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Edmund V. Ludwig, J.